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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-576

JOHN HENRY WADE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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OCTOBER TERM, 1971

NO.

JOHN HENRY WADE,

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vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, John Henry Wade, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 23, 1971.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Alabama.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 23, 1971. A timely petition for rehearing and petition for rehearing en banc was denied on September 27, 1971, and this petition for certiorari was filed within 30 days from that date. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether or not the Miranda warnings given the Defendant were sufficient.

2. Whether, under a plea of not guilty, the proper defense of entrapment renders admission of statements procured in violation of Miranda harmless error.

3. Whether the indictment should have been dismissed when the prosecution offered no excuse for the inducement of the crime.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Annotated, Title 18:

Section 5205 (a) (2). Containers of other distilled spirits.

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is

stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter.

Section 5601 (a) (1). Unregistered stills.

Any person who has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a), shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

Section 5601 (a) (7). Unlawful production, removal, or use of material fit for production of distilled spirits.

Any person who except as otherwise provided in this chapter, makes, or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

Section 5686 (a). Penalty for having, possessing, or using liquor or property intended to be used in violating provisions of this chapter.

It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

STATEMENT OF THE CASE

The Defendant, John Henry Wade, was indicted in Four Counts. Count One charged him with possession and custody of an unregistered still in violation of 26 U. S. C. Section 5601 (a) (1); Count Two charged him with making and fermenting distilled spirits on premises other than the designated premises of a designated spirits

plant lawfully qualified to produce, in violation of 26 U.S.C. Section 5601 (a) (7); Count Three charged him with possession of certain named property intended for use in illegal distillery operations, in violation of 26 U.S.C. Section 5686 (a), as amended; and Count Four charged him with illegal possession of one hundred ten (110) gallons of distilled spirits in unstamped containers, in violation of 26 U.S.C. Section 5205 (a) (2). (R., 1,2)

The Defendant was arraigned and entered a plea of not guilty. (R., 4). The Defendant was tried before a jury for two days and found guilty as charged in Counts One, Two and Four. (R., 16) The Defendant was sentenced to five (5) years imprisonment on each of the three counts on which he was convicted, the sentences on each count to run concurrently. (R., 17) The Defendant is represented on this appeal by Michael J. Romeo, of the law firm of Romeo & Swatek, 521 Massey Building, Birmingham, Alabama 35203.

STATEMENT OF THE FACTS

Mr. John D. Williams, Supervisor, U. S. Treasury Department, Alcohol, Tobacco and Firearms Division, had working under his supervision on approximately, September 24, 1969, one Hubert Dotson (R., 278), a self confessed convicted whiskey dealer (R., 298), who was being paid by Mr. Williams and his Department at the rate of Ten Dollars ($10.00) per day plus his expenses (R., 278). According to Mr. Williams' own testimony, Dotson was also paid a cash award of Seven Hundred Fifty Dollars ($750.00) based on seizures that were made (R., 296). There was also evidence from a Sheriff and his deputy that the total amount paid to Mr. Dotson was approximately Fifty Dollars ($50.00) per day (R., 324; 352). Mr. Dotson went to see one Valford Morrison sometime in September, 1969 to see if Morrison could locate him (Dotson) any liquor anywhere and Morrison told him he didn't know but he would try (R., 355). Morrison also stated that at that time I hadn't even thought anything about making any connections in any way or in fooling with any (moonshine) (R., 357). Dotson told Morrison he would pay Four Dollars ($4.00) a gallon for the whiskey and furnish the vessels (R., 357). Dotson also told Morrison he would take up to two thousand (2,000) gallons a week. (R., 358) Dotson also stated he would furnish a truck for it to be hauled on. (R., 358) Morrison testified

that Dotson called him about four days later (after the first contact) and wanted to know if he (Morrison) had any luck finding anything. (R., 362) Morrison told him that he had talked to a man that was going to talk to a man to see the Defendant, John Henry Wade, whom he had heard used to be in the Whiskey business. (R., 363, 386) Morrison made three different visits to the Defendant's home in an attempt to get him to go into the whiskey business (R., 363). On the third trip the Defendant agreed to try to come up with this contract of two thousand gallons a week. (R., 365). On October 9, 1969, Hubert Dotson (who was in the employment of U. S. Treasury Department) was given Fourteen Hundred Dollars ($1400.00) with instructions to go to Valford Morrison and buy whiskey. (R., 287) On the night of October 9, 1969, Hubert Dotson delivered to Valford Morrison Fourteen Hundred Dollars ($1400.00), a truck and containers (R., 267, 268). In the early morning hours of October 10, 1969, an airplane used by agents of the U. S. Treasury Department, Alcohol, Tobacco and Firearms Division followed Hubert Dotson's truck from Valford Morrison's house to a junkyard in Sawyerville, Hale County, Alabama (R., 262, 263), which junkyard was approximately three and one-half miles from the illicit still site. (R., 255) On the morning of October 10, 1969, Valford Morrison delivered the whiskey back to Hubert Dotson. (R., 311) On October 15, 1969, one Niles Graham, a Federal Agent, and others found a truck and a new empty still behind the junkyard located at Sawyerville, Hale County, Alabama. (R., 250) At that time Agent Graham put his initials on the new still and said still later turned up and was identified at the distillery site. (R., 252) On October 16, 1969, a Federal Agent, Pike, and other Agents, as a result of a stake-out at the junkyard in Sawyerville, followed a truck (which remains undescribed and unidentified) to the area of the distillery. (R., 88) On October 17, 1969, Federal Agents, Williams and Woodard, delivered to Mr. Dotson some plastic containers that were secretely marked by government officers. (R., 305, 306) These containers later were found at the distillery site. (R., 187, 188) On October 19, 1969, Federal Agents, Harold Pike and other agents, of the Alcohol, Tobacco and Firearms Division of the Treasury Department of the United States discovered an unregistered distillery in the open woodland of Hale County, Alabama. (R., 85, 90, 91) The individual stills were loaded in with fermenting mash. (R., 92) Special Agent Pike testified that one of the stills was new and that the others had been run a few times.

(R., 135) The Federal Agents then left the still site and on October 22, 1969, returned to the area and set up observation of the distillery site. (R., 93). In the early morning on October 22, 1969, the stills were put in operation (R., 94, 95) approximately 8:00 a.m. the same date that the Defendant appeared in a red and white Ford pickup truck and drove into the area and down to the still. (R., 95) Approximately an hour later the Defendant drove away from the distillery the way he came in. (R., 96, 97) The distillery stayed in operation that entire day and shortly after dark, the distillery was shut down. (R., 106, 108) At about 3:00 a.m. on October 23, 1969, the distillery was placed back in operation. (R., 109) At 5:30 a.m., October 23, 1969, the red and white pickup truck returned to the distillery site and the Agents prepared to raid it. (R., 109)

As the government agents approached, they heard the truck crank up and start to leave the distillery site. (R., 110) The truck stopped at a gap in the fence about fifty (50) yards from the distillery site. (R., 110) The Defendant was driving the truck. (R., 111) The witness yelled, "Federal Officers, you are under arrest." The truck accelerated sharply up the hill. The truck had two fifty-five (55) gallon drums in the back and the Federal Agent radioed to other agents. (R., 111, 112)

Richard Dickinson testified that he is an investigator for the Alcohol, Tobacco and Firearms Division. (R., 174) He received Agent Pike's radio message. (R., 176, 177) He saw the pickup truck coming up the dirt road from the distillery site and attempted to block the road and stop it. (R., 177, 178) The truck got around and he chased it a quarter of a mile until it stopped. (R., 178, 179) Two people jumped from the truck and ran. (R., 179) The truck contained two fifty-five (55) gallon drums full of moonshine whiskey to which there were no tax stamps attached. (R., 179, 180) Agent Pike found the Defendant, John Henry Wade, walking beside the road in a cotton field in the same general area and placed him under arrest. (R., 113, 126) Arresting Federal Agent Harold K. Pike testified in the Judge's chambers regarding the Miranda warning he gave Defendant as follows:

> "I told him before we asked him anything, it was my duty to advise him of his Constitutional rights. I told him he was entitled to the advice of an Attorney of his choice,

if he could not hire one, one would be appointed for him at no cost to him, by the Commissioner or the Court Official. I told him if he started to answer questions without an Attorney, that he could stop the questioning at any time for the purpose of consulting an Attorney, or stop the questioning at any time. I told him he had a right to waive advice of counsel and to answer any questions or to make any statement he so desired in my presence. Area Supervisor Dickinson asked him if he understood his rights and he said he did." (R., 115)

Federal Agent Pike further testified regarding the Miranda warning as follows:

"Question: Did you tell him when an Attorney would be appointed for him if he so desired?

Answer: No Sir, I told him if he wanted an Attorney, he could have the Attorney of his choice or the Court would appoint him one.

Question: And when would he be appointed, and by whom,

Answer: By the Commissioner or other Court Official." (R., 117)

The Court asked Federal Agent Harold K. Pike the following questions:

"Question: The Court: What if anything did you say about when an Attorney would be appointed for him, before the questioning or after the questioning or did you just leave it in the air?

Answer: I told him that if he desired an Attorney and could not afford one, the United States Commissioner or the Court would appoint him a lawyer." (R., 119)

After the above warnings, the following statements were admitted into evidence by the prosecution's first witness and over objection of defense counsel:

> "He stated that the distillery was his. That he was the only one involved in it, that he did not know who the other man was in the truck with him that jumped out and ran. He continuously apologized for the fact that I was injured when I was thrown from the truck. I believe that is about the extent of it." (R., 128)

The Defense consisted of testimony of various witnesses through which the Defendant sought to establish entrapment on the basis that government agents had provided the money and initiative for the Defendant to purchase the necessary equipment to set him up in the illegal distillery business. (R., 225, 390)

Petitioner duly accepted to the admission into evidence of statements made by the Defendant and an appeal was duly perfected to the United States Court of Appeals for the Fifth Circuit. That Court affirmed on July 23, 1971, and denied his petition for rehearing and petition for rehearing en banc on September 27, 1971.

REASON FOR GRANTING THE WRIT

INTRODUCTION

To quote Judge Rives when faced with the identical situation here at bar in *Henderson* vs. *United States,* 237 F.2d 169 (1956), at Page 173,

> ". . . so here it seems to us that the Defendant could admit operating the illicit still, deny being a party to the conspiracy charge, and still defend on the ground that such overt acts as he did commit were done as a result of entrapment; he could say, 'I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped'."

This would have remained a profoundedly insignificant case to all except its immediate parties had it not been so tried and substituted to the jury as to raise questions both fundamental and far-reaching in Federal criminal law, for which reason certiorari should be granted.

I.

THE DECISION BELOW CONFLICTS DIRECTLY WITH DECISIONS OF THIS COURT, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND OTHER COURTS OF APPEAL.

Lathers vs. *United States,* 396 F.2d 524 (1968), wherein the Court held that Miranda requires the preconfession warning to specify that a Defendant is entitled "to the presence of an Attorney, retained or appointed, during the interrogation." In the *Lathers* case an F. B. I. agent's warning to Lathers provided that "if he was unable to hire an Attorney, the Commissioner or the Court would appoint one for him." The Court held that the warning did not lay out in clear terms the extent of Lathers' rights. Lathers was not advised that he could have an attorney appointed and present with him before he uttered a syllable. The message to him indicated only that a Judge or Commissioner somewhere down the line would appoint a lawyer for him if he so requested. The Miranda warning must effectively convey to the accused that he is entitled to a government furnished counsel here and now. The words must assert with conviction that any accused can have a lawyer before speaking. Otherwise, the warning is delusory and the Miranda safeguards are delusory. Accordingly, the Court held that an individual held for interrogation must be clearly informed that he has the right to counsel with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.

Sorrells vs. *United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932), held that the defense of entrapment may be raised under a plea of not guilty because it is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.

Henderson vs. *United States,* 237 F. 2d 169 (1956), the Court held that the Defendant could admit operating the illicit still, deny being a party to the conspiracy charged, and still defend on the ground that such overt acts as he did commit were done as a result of entrapment; he could say, "I did not go so far as to

become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped." The two defenses do not seem to us so repugnant that proof of one necessarily disproves the other.

In the instant case, Your Petitioner would respectfully bring to the Court's attention that your Petitioner was charged in Count One with possession and custody of an unregistered still in violation of 26 U.S.C. Section 5601 (a) (1); that Defendant pleaded not guilty to said charge and that other than the admission into evidence of Defendant's statements (which were in violation of standard set by the Miranda decision) there was absolutely no other evidence or testimony that the still in question was in the possession of or the custody of Petitioner.

Count Two charged your Petitioner with making and fermenting distilled spirits on premises other than the designated premises of a designated spirits plant lawfully qualified to produce, in violation of 26 U.S.C. Section 5601 (a) (7); and that other than Defendant's own statement admitted into evidence (in violation of Miranda decision) there was absolutely no other evidence or testimony that Defendant (your Petitioner) made or fermented the distilled spirits in question. In fact, the evidence put on by the prosecution indicated that someone other than your Petitioner operated said distillery.

Count Three charged your Petitioner with possession of certain named property intended for use in illegal distillery operations in violation of 26 U.S.C., Section 5686 (a), as amended; to which charge, the jury found your Petitioner not guilty.

Count Four charged your Petitioner with the illegal possession of one hundred ten (110) gallons of distilled spirits in unstamped containers, in violation of 26 U.S.C. Section 5205 (a) (2), which is absolutely the only count to which the prosecution offered evidence in support of the charge other than Defendant's own statements admitted into evidence.

It is your petitioner's contention that here as in the *Henderson* case, *supra,* your Petitioner could admit the charges in Count Four (possession of one hundred ten (110) gallons of distilled spirits), deny the charge in Count One, Two and Three, and still defend on

the ground that such overt acts as he did commit were done as a result of entrapment.

United States vs. *Sherman,* 200 F.2d 880 (1952), here as in Petitioner's case the government used an informant or a known dealer to induce the commission of a crime. The Court states that in such cases, two questions of fact arise: 1. Did the agent induce the accused to commit the offense charged in the indictment? 2. If so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense? On the first question the accused has the burden; on the second, the prosecution has it.

If the Petitioner had the affirmative evidence to support the defense of entrapment, even though not conclusive, the prosecution then had the burden upon the issue of the excuse for inducement, it had to satisfy the jury that Petitioner did not need any persuasion; but that he stood ready to procure illicit whiskey for anyone who asked for it.

In the case at bar Petitioner would point out that the Prosecution proffered absolutely no evidence upon the issue of the excuse for inducement to the jury.

In the *Sherman* case, the Court stated, "we need not, however, decide that the refusal to direct a verdict rquired a dismissal of the indictment, because there must be a reversal anyway, and upon a new trial there may be other evidence of Sherman's dealings in narcotics. The decision below is in irreconcilable conflict with the above decision of this Court and with decisions of the United States Court of Appeals for the Fifth Circuit and with those of other Courts of Appeals.

II.

THE DECISION BELOW ERASES BASIC CONSTITUTIONAL RIGHTS.

The decision below erases a basic Sixth Amendment Constitutional right of an accused to have assistance of counsel as set out in Miranda. The decision below also attempts to circumvent the accused's right to due process as guaranteed by the Fourteenth Amendment as set out by the Honorable Court in *Henderson* vs. *United States.*

CONCLUSION

To protect the fundamental Constitutional rights of an accused of assistance of counsel and his Constitutional right to due process, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

MICHAEL J. ROMEO
Romeo & Swatek
Attorneys at Law
521 Massey Building
Birmingham, Alabama 35203

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Michael J. Romeo, attorney for John Henry Wade, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of October, 1971, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the United States as follows:

1. By mailing in the United States Mail three copies of same in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530.

2. By mailing in the United States Mail three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable C. S. White-Spunner, Jr., United States Attorney for the Southern District of Alabama, Post Office Drawer E, Mobile, Alabama 36601.

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 30874

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JOHN HENRY WADE,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Alabama

(July 23, 1971)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM: Judgment AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 431 F.2d 409, Part I. (5th Cir. 1970).

[1]See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30874
Summary Calendar

D. C. Docket No. CR 15, 495

UNITED STATES OF AMERICA,
Plaintiff-Apellee,

versus

JOHN HENRY WADE,
Defendant-Apellant.

Appeal from the United States District Court for the Southern District of Alabama

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by htis Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Issued As Mandate: July 23, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30874

UNITED STATES OF AMERICA,
Plaintiff-Apellee,

versus

JOHN HENRY WADE,
Defendant-Apellant.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion July 23, 1971, 5 Cir., 1971 F.2d).

(September 27, 1971)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Apellate Procedure; Local Fifth Circuit Rule 12) the Petition for rehearing En Banc is DENIED.